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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 45313-4-II

**IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON, DIVISION II**

CAPITAL ONE BANK (USA), N.A.

Respondent

V.

DAVID L KOPLITZ

Appellant

APPEAL FROM THURSTON COUNTY CASE NO. 11-2-02189-8

RESPONDENT'S BRIEF

CAPITAL ONE BANK (USA), N.A.

c/o Suttell & Hammer, P.S.

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P/m 6/12/14

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I. INTRODUCTION

This is a simple collection case in which the Appellant David L. Koplitz (hereafter “Koplitz”), seeks to avoid paying a credit card debt that he incurred. Koplitz has never denied the fact that he applied for, received, and used a credit card issued by Respondent Capital One Bank (USA), N.A. (hereafter “Capital One”). Koplitz did not submit an Answer to Capital One’s Summons and Complaint, nor a contradicting affidavit to the trial court in response to Capital One’s Motion for Default Judgment.

Koplitz now claims that he was not properly served with the Summons and Complaint, and claims that the trial court erred in denying his Motion to Vacate Default Judgment. As recognized by the trial court, Capital One produced a Declaration of Service demonstrating that Koplitz was properly served with the Summons and Complaint, and Koplitz failed to present clear and convincing evidence to the contrary. As a result, the trial court denied Koplitz’s Motion to Vacate Default Judgment. Capital One now respectfully requests that this Court affirm the trial court’s Order Denying Defendant’s Motion to Vacate Judgment that was entered on August 9, 2013.

II. STATEMENT OF THE CASE

Capital One issued a credit card account to Koplitz. CP 12-13, 15. The credit card account had an account number ending in 8346. *Id.* Koplitz used the credit card to make purchases for goods and services. CP 12-13. Koplitz eventually defaulted on the credit card agreement by failing

to make payments on the credit card account and Koplitz became indebted to Capital One in the amount of \$16,388.60. Id.

As a result of the default, Capital One initiated a lawsuit against Koplitz for this credit card account by serving him with a Summons and Complaint on June 8, 2011 at the address of 5820 25th Ave SE, Lacey, WA 98503, and by leaving the documents with Bruce Gingrich (hereafter “Gingrich”), identified as a co-resident, who stated that he resided at Koplitz’s usual place of abode. CP 3-5, 88-90. In response to being served, Koplitz mailed a letter to counsel for Capital One, in which he stated that he received the service papers at his brother’s address, and in which he stated his address was 3959 Martin Way E, Olympia WA 98506, and included an envelope with this same address hand-written as the return address. CP 133-134. Capital One treated Koplitz’s June 2011 letter as his Notice of Appearance, and noted a Motion for Default Judgment for December 2, 2011, mailing the Notice of Hearing, the Motion and Declaration for Default Judgment, Affidavit of Service and Proposed Order to Koplitz at the address that he had given in his Notice of Appearance, 3959 Martin Way E, Olympia WA 98506. CP 91-92. Koplitz failed to appear or otherwise respond, and the trial court granted judgment against Koplitz on December 2, 2011. CP 19-21.

Capital One then filed a Writ of Garnishment of Koplitz's Washington State Employees Credit Union bank account, and served notice of the Writ of Garnishment to Koplitz at the address of 3959 Martin Way E, Olympia WA 98506. CP 95-99. The Writ was issued on October 3, 2012. CP 95-97. Capital One received an Answer from Washington State Employees Credit Union stating that \$11,562.34 was captured in the garnishment. CP 103-104. In response to the Washington State Employees Credit Union garnishment, Capital One received Koplitz's "Answer to Write [sic] to Garnishment: by David Koplitz," which Capital One interpreted to be an exemption claim, and which stated Koplitz's address was 5820 25th Ave SE, Lacey WA 98503. CP 105-108. This document included a declaration of Gingrich, which is dated and signed on June 5, 2011, three days prior to the date of service, and which is not sworn under penalty of perjury and is not notarized. Id. This document also included a Puget Sound Energy utility bill dated October 24, 2012, and which states Koplitz's address is the same as the service address, 5820 25th Ave SE, Lacey WA 98503. Id. Capital One noted a Motion to Deny Defendant's Exemption Claim for November 9, 2012, and sent notice to Koplitz at 3959 Martin Way E, Olympia WA 98506, because that was the address Koplitz had provided in his Notice of Appearance. CP 109-110, 119-141. Upon review of the documents, Judge McPhee interpreted Koplitz's

pleadings as a motion to vacate judgment, and ordered that Capital One may re-note the matter, but must send notice to Koplitz at 5820 25th Ave SE, Lacey WA 98503, and provide supplemental pleadings addressing the issues in Koplitz's Motion to Vacate Judgment. CP 23.

Thereafter, Capital One re-noted its Motion to Deny Koplitz's Exemption Claim and also filed a response to Koplitz's Motion to Vacate Judgment, both mailed to Koplitz at 5820 25th Ave SE, Lacey WA 98503. CP 24-25, 142-191. On November 30, 2012, Judge McPhee heard oral arguments of the parties and stated he would issue a ruling at a later date. CP 26, 38-39. November 30, 2012, was Judge McPhee's last day on the bench Id. Koplitz subsequently filed additional documentation with the trial court. CP 27-37. This documentation included Koplitz's letter filed on December 3, 2012, and Koplitz's Answer to Writ of Garnishment filed on January 10, 2013. Id. Koplitz's letter only states that the address of 3959 Martin Way E, Olympia WA 98506 was Koplitz's work address, and he admits that he provided this address to Capital One. CP 27-30. Koplitz's Answer to Writ of Garnishment includes a property rental agreement for Gingrich, but it does not state the address to be rented and is not dated. CP 34. Koplitz's Answer to Writ of Garnishment also includes an envelope mailed by Capital One to Koplitz, and documents regarding Countrywide. CP 35-37.

Judge McPhee issued a ruling on April 16, 2013, stating he had reviewed the entire court file including Koplitz's late filings, denying Koplitz's motion to vacate judgment and exemption claim, and directing Capital One to prepare an order and consult with the trial court regarding entry of the order, as Judge McPhee, who issued the ruling, had since retired. CP 38-39.

Capital One then noted a presentation of orders for April 26, 2013. CP 40-47, 192-193. The newly assigned Judge Price did not enter the proposed orders on April 26, 2013, and Capital One re-noted the presentation of orders for May 17, 2013. CP 47, 194-197. Koplitz also filed supplemental documentation and a new motion to vacate default judgment, but did not note it for any date. 48-67, 198-204. Koplitz's supplemental documentation included the declarations of Diane Elwin and Gary Wilson, which were not notarized, and a Lacey Police Department Crime and Incident Report regarding Gingrich dated prior to the date of service. CP 48-67, 198-204. On May 17, 2013, the parties entered an agreed order to allow retired Judge McPhee to preside over the hearing for the presentation of orders as a judge pro tempore. CP 205-206.

Koplitz subsequently filed a Motion to Vacate Default Judgment and a Motion to Strike Documents, neither of which were noted or heard by the trial court. CP 70-71. Capital One then noted the presentation of

orders to be before Judge McPhee on August 9, 2013, sending notice to Koplitz at the address of 5820 25th Ave SE, Lacey WA 98503. CP 73-74, 207-208. In response, Koplitz noted a motion to compel for the same date, but it was not timely and was not heard. CP 75-78. On August 9, 2013, Judge McPhee entered an order denying Koplitz's motion to vacate judgment, and an order denying Koplitz's exemption claim. CP 80-83. Koplitz subsequently filed this appeal on September 6, 2013.

III. ARGUMENT

A. ISSUES ON APPEAL

Whether the trial court properly denied Koplitz's motion to vacate judgment.

B. STANDARD OF REVIEW

1. REVIEW OF SERVICE OF PROCESS

The appellate court reviews *de novo* a ruling regarding whether service of process was proper. Pascua v. Heil, 126 Wn. App. 520, 526 (2005). Service of the summons and complaint must be proper, otherwise a court does not have jurisdiction and any judgment entered is void. Woodruff v. Spence, 76 Wn. App. 207, 209 (1994). "Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed *de novo*." Dobbins v.

Mendoza, 88 Wn. App. 862, 871 (1997). CR 60(b)(5) requires that the court vacate a judgment if the judgment is void.

C. ANALYSIS

1. SERVICE OF PROCESS OF THE SUMMONS AND COMPLAINT IS PRESUMED VALID

RCW 4.28.080 sets forth how a summons must be served. The statute requires personal service of a summons on a defendant or alternatively permits substituted service “by leaving a copy of the summons at the house of [the defendant’s] usual abode with some person of suitable age and discretion then resident therein.” RCW 4.28.080(15). CR 5(b)(1) reads in relevant part, “Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address.” CR 5(b)(1) goes on to say that delivery of a copy within the rule means, “leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.”

As a matter of law, a party challenging service has the burden to establish service was improper when an affidavit of service is filed. “An Affidavit of Service is presumed to be valid if it is regular in its form and substance; the person contesting the service must prove by clear and convincing evidence that the service was improper.” State ex rel Coughlin

v. Jekins, 102 Wn. App. 60, 65 (2000). A return of service stands as “*prima facie* correct”. John Hancock Mutual Life Insurance Co. v. Gruley, 196 Wn. 357, 83 P.2d 211 (1938). “An affidavit of service regular in form and substance is presumptively correct.” Lee v. Western Processing Comp, 35 Wn. App. 466, 469 (1983).

A Declaration of Service regular in form and substance was filed by Capital One establishing that Koplitz was served on June 8, 2011, by substitute service at 5820 25th Ave SE, Lacey WA 98503. CP 5. The burden is now on Koplitz to prove through clear and convincing evidence that the service was improper. Koplitz fails to do so and the evidence provided by Capital One gives little doubt that the service was proper.

The Declaration of S. Treiber states that “On the date and time of June 8 2011 10:47 AM at the address of 5820 25TH AVE SE LACEY, within the County of Thurston, State of WASHINGTON,” David Koplitz was served by leaving a copy with “Bruce Gingrich CO-RESIDENT, a brown-haired white male approx. 35-45 years of age, 6’0”-6’6” tall and weighing 160-180 lbs., a person of suitable age and discretion who stated they reside at the Defendant’s/respondent’s usual place of abode listed above.” CP 5. The Declaration of Service is sworn under penalty of perjury under the laws of the State of Washington. Id. This Declaration of Service is regular in form and substance and thus is presumptively correct.

Koplitz's Motion to Vacate Judgment fails to establish through clear and convincing evidence that the service was improper. First, Koplitz fails to submit a sworn affidavit stating that he was not served. CP 105-108. In a letter Capital One received on June 27, 2011, Koplitz states that service was improper because the service address was merely a place his brother stayed at. CP 133. Subsequently, Koplitz claims that he does live at the service address, but that he was not properly served because his brother found the documents by the door. CP 105-108. These inconsistent statements question the credibility of Koplitz's claims and do not rise to the level of clear and convincing evidence.

Second, the affidavit of Gingrich and the Puget Sound Energy utility bill do not prove through clear and convincing evidence that service was not proper. Gingrich's affidavit is not sworn under penalty of perjury and is dated and signed on June 5, 2011, three days prior to the date of service. CP 124. The Declaration of Service expressly states that Koplitz was served on June 8, 2011. CP 5. This discrepancy questions the credibility and relevance of Gingrich's affidavit. Further, Gingrich's affidavit is not notarized, and therefore it is not conclusive that it was even signed by Gingrich. CP 124. In contrast, the Declaration of Service submitted by Capital One is sworn under penalty of perjury by an unbiased third party. CP 5. Due to the inconsistent date and the fact that

the affidavit of Gingrich is not sworn under penalty of perjury, Gingrich's affidavit cannot rise to the level of clear and convincing evidence to overcome the presumption of valid service. Further, the Puget Sound Energy utility bill is dated October 24, 2012, over a year after Koplitz was served, and it shows that Koplitz was a resident at the service address so it could not prove that service was improper at this address. CP 108. Therefore, it is not relevant to this matter and does not prove through clear and convincing evidence that service was not proper.

Third, Koplitz admits he actually received the Summons, Complaint, and Notice to Service Members and Their Dependents. CP 105-108, 133-134. In response to the Summons and Complaint, Koplitz mailed Capital One a letter, received on June 27, 2011, which states that he received the service papers, but at his brother's address. CP 133-134. In that letter, Koplitz provided Capital One with an alternative contact address, 3959 Martin Way E, Olympia WA, 98506. Id. Koplitz subsequently claims in his motion to vacate judgment that he has no association with the address of 3959 Martin Way E, Olympia WA, 98506 and that the service address is in fact his residence. CP 105-108. Again, these inconsistent statements question Koplitz's credibility.

The trial court states in its opinion that Judge McPhee reviewed the entire court file prior to issuing the opinion. CP 38-39. These documents

included Koplitz's letter filed on December 3, 2012, and Koplitz's Answer to Writ of Garnishment filed on January 10, 2013. CP 27-37. However, neither of these documents provide clear and convincing evidence that service of process was not proper. Koplitz's letter only states that the address of 3959 Martin Way E, Olympia WA, 98506 was Koplitz's work address, and Koplitz admits that he provided this address to Capital One. CP 27-30. Koplitz's Answer to Writ of Garnishment includes a property rental agreement for Gingrich, but it does not state the address to be rented and is not dated, and therefore does not establish whether Gingrich resided at the service address at the time of service. CP 34. Koplitz's Answer to Writ of Garnishment also includes an envelope mailed by Capital One to Koplitz, and documents regarding Countrywide, however, neither of these documents are relevant to this matter, and neither prove through clear and convincing evidence that service of process was not proper. CP 35-37.

Koplitz continued to file additional documentation with the trial court after Judge McPhee issued the court's opinion on April 16, 2013, but before the trial court signed its Order Denying Koplitz's Motion to Vacate Judgment. CP 48-67, 70-71, 75-78, 198-204. Any documentation filed by Koplitz after April 16, 2013 was grossly untimely and not considered by the trial court as part of its ruling, and therefore should not

be considered now on appeal. Nevertheless, none of this additional documentation rises to the level of clear and convincing evidence that service of process was improper. For example, the declarations of Diane Elwin and Gary Wilson fail to conclusively establish whether Gingrich resided next door to Koplitz and if so when, and fail to establish that Gingrich did not live with Koplitz at the time of service. CP 48-67, 198-204. Similarly, the Lacey Police Department Crime and Incident Report regarding Gingrich is dated prior to the date of service, and therefore fails to establish through clear and convincing evidence that Gingrich did not live with Koplitz at the time of service. Id.

Due to the foregoing reasons, Koplitz fails to meet his burden and prove by clear and convincing evidence that service was improper. None of the evidence provided by Koplitz establishes that Gingrich did not reside at Koplitz's address at the time of service. Further, Koplitz's numerous inconsistent statements question his credibility and the credibility of his evidence. Therefore, the trial court properly Denied Koplitz's Motion to Vacate Judgment.

2. NOTICE OF THE MOTION FOR DEFAULT JUDGMENT IS PROPER

CR 4(a)(3) states that "[a] notice of appearance, if made, shall be in writing, shall be signed by the defendant or his attorney, and shall be

served upon the person whose name is signed on the summons.”
“Substantial compliance will satisfy the notice of appearance requirement.” Morin v. Burris, 160 Wn.2d 745, 759 (2007).

In response to the Summons and Complaint, Koplitz mailed Capital One a letter, received on June 27, 2011, which states that he received the service papers, but at his brother’s address. CP 133-134. In that letter, Koplitz provided Capital One with an alternative contact address, 3959 Martin Way E, Olympia WA, 98506, and hand-wrote this same address as the return address on the envelope. Id. Capital One treated the June 2011 letter as Koplitz’s Notice of Appearance and mailed subsequent pleadings and correspondence to the new address provided by Koplitz, including Capital One’s Motion for Default Judgment, Writ of Garnishment, and Motion to Deny Exemption Claim. CP 6-18, 91-92, 95-99, 109-110, 119-141. Capital One sent notice of the Motion for Default Judgment to the address Koplitz provided in his Notice of Appearance to ensure Koplitz received the Motion and to ensure Koplitz had the opportunity to appear and raise any objections. Koplitz subsequently claims in his motion to vacate judgment that he has no association with the address of 3959 Martin Way E, Olympia WA, 98506 and that the service address is in fact his current address. CP 105-108. However, these statements are inconsistent with the letter Capital One received in June

2011. Capital One properly sent notice to the address Koplitz provided with his Notice of Appearance, and therefore the Default Judgment was properly entered, and Judge McPhee properly denied Koplitz's Motion to Vacate Judgment.

3. Matter Properly Heard by Retired Judge

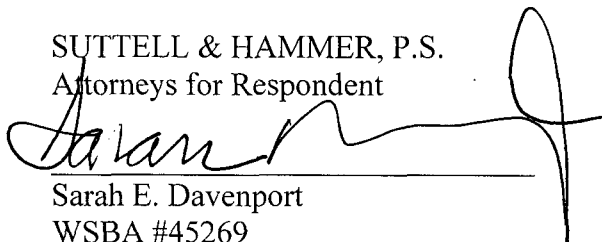
RCW 2.08.180 states in relevant part, "if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement." Here, Judge McPhee presided over the first exemption claim hearing and ordered Capital One to re-note the hearing and also provide a response to Koplitz's motion to vacate judgment. CP 23. Judge McPhee subsequently presided over the second exemption claim hearing and the hearing regarding Koplitz's motion to vacate judgment. CP 38-39. Therefore, Judge McPhee was entitled to issue a ruling on those motions and sign orders regarding those hearings at a later date, even though he was already retired. Further, the parties agreed in writing to Judge McPhee hearing this matter, and therefore Koplitz cannot now claim that it was improper for Judge McPhee to rule on the motions and sign the orders. CP 205-206. The fact that Judge McPhee was no longer on the bench does not matter, he was allowed to hear this matter and issue a ruling.

IV. CONCLUSION

Koplitz fails to establish by clear and convincing evidence that the service of process was improper. Therefore, Capital One respectfully requests that the Court affirm the trial court's Order Denying Koplitz's Motion to Vacate Judgment.

Dated this 11 day of June, 2014.

SUTTELL & HAMMER, P.S.
Attorneys for Respondent

A handwritten signature in black ink, appearing to read 'Sarah', is written over a horizontal line. The signature is stylized with a large loop at the end.

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DIVISION II

CAPITAL ONE BANK (USA), N.A.

Respondent

vs.

APPELLATE COURT

DAVID L KOPLITZ

No. 45313-4-II

Appellants

CERTIFICATION OF MAILING

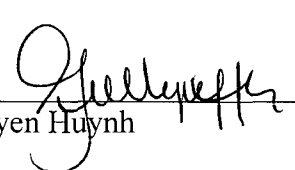
TO: Clerk of the Court

AND TO: Appellant


I certify that on 17th of June, 2014, I mailed, postage prepaid, a copy of

Respondent's Brief to:

DAVID L KOPLITZ
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TuUyen Huynh

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